

BURSOR & FISHER, P.A.
L. Timothy Fisher (State Bar No. 191626)
Joel D. Smith (State Bar No. 244902)
Frederick J. Klorczyk III (State Bar. No. 320783)
1990 North California Boulevard, Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
E-Mail: ltfisher@bursor.com
jsmith@bursor.com
fklorczyk@bursor.com

BURSOR & FISHER, P.A.
Scott A. Bursor (State Bar No. 276006)
2665 S. Bayshore Dr., Suite 220
Miami, FL 33133-5402
Telephone: (305) 330-5512
Facsimile: (305) 676-9006
E-Mail: scott@bursor.com

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JEREMIAH REVITCH, individually and
on behalf of all others similarly situated,

Case No. 3:18-cv-06827-VC

Plaintiff.

SECOND AMENDED CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

**NEW MOOSEJAW, LLC and
NAVISTONE INC**

Defendants

1 Plaintiff Jeremiah Revitch (“Plaintiff”), individually and on behalf of himself and all others
 2 similarly situated, by and through his attorneys, makes the following allegations pursuant to the
 3 investigation of his counsel and based upon information and belief, except as to allegations
 4 specifically pertaining to himself and his counsel, which are based on personal knowledge.

5 **NATURE OF THE ACTION**

6 1. This is a class action suit brought against Defendants New Moosejaw, LLC
 7 (“Moosejaw”) and NaviStone, Inc. (“NaviStone”) (collectively, “Defendants”) for wiretapping the
 8 computers of visitors to Defendant Moosejaw’s website, Moosejaw.com. The wiretaps, which are
 9 secretly embedded in the computer code on Moosejaw.com, are used by Defendants to scan the
 10 user’s computer in search of files that can be used to de-anonymize and identify the user, and also to
 11 observe visitors’ keystrokes, mouse clicks,¹ and other electronic communications in real time for the
 12 purpose of gathering Personally Identifiable Information (“PII”) to de-anonymize those visitors –
 13 that is, to match previously unidentifiable website visitors to obtain their names and home
 14 addresses, along with detailed data concerning their browsing habits. These wiretaps enable
 15 Defendants to immediately, automatically, and secretly observe the keystrokes, mouse clicks, and
 16 other electronic communications of visitors regardless of whether the visitor ultimately makes a
 17 purchase from Moosejaw. By doing so, Defendants have violated the California Invasion of
 18 Privacy Act (“CIPA”), Cal. Penal Code §§ 631, 632, and 635; have invaded Plaintiff’s privacy
 19 rights in violation of the California Constitution; have intruded upon the seclusion of Plaintiff; have
 20 violated California’s Consumers Legal Remedies Act, Civil Code §§ 1750, *et seq.*; and have
 21 committed other tortious acts as described herein.

22 2. On several occasions prior to the filing of this lawsuit, Plaintiff Revitch visited
 23 Moosejaw.com. During each of Plaintiff’s visits Defendants scanned his device for files that could
 24 be used to de-anonymize and identify him, captured his electronic communications and redirected
 25 them to NaviStone in real time, and used the intercepted data to attempt to learn his identity, postal
 26 address, and other PII.

27 ¹ As used herein, the term “mouse clicks” also refers to “touch gestures” such as the “tap,” “swipe,”
 28 and similar gestures used on touchscreen devices.

1 3. Specifically, when browsing Moosejaw.com during the relevant time period,
 2 Plaintiff Revitch previously had a cookie placed on his computer from AGKN.com, also known as
 3 Aggregate Knowledge, a third-party data broker. This is not an ordinary cookie – it is linked to a
 4 database of real-life names, addresses, contact information, browsing habits, and other PII. In turn,
 5 upon visiting Moosejaw.com, Defendants' wiretaps scanned Plaintiff Revitch's computer, located
 6 the AGKN.com cookie, and coordinated with Aggregate Knowledge to de-anonymize Plaintiff
 7 Revitch. *See infra*, at "Defendants' Practice of Scanning Visitors' Computers for De-Anonymizing
 8 Files."

9 4. Furthermore, Plaintiff Revitch visited the "Registration" and "Sign In" pages on
 10 Moosejaw.com during the relevant time period. Plaintiff Revitch also reviewed the "Shipping and
 11 Billing Policy" and the "Return and Exchange Policy." Plaintiff Revitch also browsed the
 12 following items on Moosejaw.com: Patagonia Men's R0 Sun Hoody, Patagonia Men's Insulated
 13 Fjord Flannel Jacket, Patagonia Bandana Blue Fjord Insulated, Hestra Juniors' Heli Ski 3 Finger
 14 Glove, Crescent Moon EVA The All Foam Snowshoe, Patagonia Men's Tropic Comfort Hoody II,
 15 Patagonia Men's RD Long-Sleeved Sun Tee, Icebreaker Men's Pursuit Legless, Five Ten Men's
 16 Freerider Shoe, Five Ten Men's Freerider Contact Shoe, and Five Ten Kids' Freerider Shoe.
 17 Plaintiff Revitch also viewed a page listing items subject to the "Icebreaker Sale."

18 5. Mr. Revitch visited Moosejaw.com numerous times in 2017, including on January 8,
 19 March 1, several days in April, August 10, and December 8.

20 6. When conducting these browsing activities, Plaintiff Revitch's key strokes, mouse
 21 clicks, and other information were observed by Defendants' wiretaps in real time. For example,
 22 Defendants' wiretaps collected the data typed by Plaintiff Revitch into the online forms on
 23 Moosejaw.com in real time. *See infra*, at "NaviStone's Wiretaps in Action at Moosejaw.com."

24 7. In *Brady Cohen v. New Moosejaw, LLC*, Case No. 1:17-cv-09389-WHP (S.D.N.Y.),
 25 a resident and citizen of New York, plaintiff Brady Cohen, brought claims under New York law
 26 based on substantially similar facts. In its order dismissing Mr. Cohen's claims, the court noted that
 27 Mr. Cohen's allegations were "unsettling," "disturbing," and "troubling," but the alleged conduct
 28 nonetheless "does not violate any of the [New York] statutes on which Cohen predicates his

claims.” Here, Plaintiff Revitch is now bringing claims under California’s privacy laws.

8. Plaintiff brings this action on behalf of himself and a class of all persons whose electronic communications were intercepted through the use of NaviStone's wiretap on Moosejaw.com.

THE PARTIES

9. Plaintiff Jeremiah Revitch is a natural person and citizen of the State of California who resides in Mill Valley, California. Throughout 2017, Mr. Revitch browsed Defendant Moosejaw's website at Moosejaw.com. During each of these visits, Mr. Revitch browsed Moosejaw.com because he intended to purchase outerwear. Although Mr. Revitch never consented to any interception, disclosure or use of his electronic communications, Mr. Revitch's keystrokes, mouse clicks, and other electronic communications were intercepted in real time and were disclosed to NaviStone through Moosejaw's use of NaviStone's wiretap. In doing so, Defendants gathered Mr. Revitch's PII, including his keystrokes, mouse clicks, and other electronic communications. Defendants also scanned Mr. Revitch's computer in search of files that could be used to de-anonymize him. As a result of these activities, Defendants then de-anonymized and identified Mr. Revitch as a visitor to Moosejaw.com. Mr. Revitch was unaware at the time that his keystrokes, mouse clicks, and other electronic communications were being intercepted and disclosed to a third party. Mr. Revitch learned of these facts in December 2017. Mr. Revitch had a reasonable expectation of privacy when browsing Moosejaw.com, in that he never expected that his keystrokes, mouse clicks, and other electronic communications were being intercepted and disclosed to a third party, or that Defendants would de-anonymize and identify him as a result of his browsing.

10. Defendant New Moosejaw, LLC is a Delaware limited liability company with its principal place of business at 32200 North Avis Suite 100, Madison Heights, Michigan. Moosejaw does business throughout California and the entire United States. "Moosejaw is a leading online active outdoor retailer with a large web presence as well at 10 physical stores."² "Moosejaw carries more than 400 brands, including Patagonia, The North Face, Marmot, Arc'teryx and more.

² <https://news.walmart.com/2017/02/15/walmart-announces-the-acquisition-of-moosejaw-a-leading-online-outdoor-retailer>

[Moosejaw] has an extensive assortment of apparel and gear for climbing, hiking, camping, snow sports, yoga, swimming and biking.”³

11. Defendant NaviStone, Inc. is a Delaware corporation with its principal place of business at 1308 Race Street, Cincinnati, Ohio 45202. NaviStone does business throughout California and the entire United States. NaviStone is an online marketing company and data broker that deals in U.S. consumer data.

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A) because this case is a class action where there are more than 100 members in the Class, the aggregate claims of all members of the proposed class are in excess of \$5,000,000.00, exclusive of interest and costs, and Plaintiff, together with most members of the proposed class, are citizens of states different from Defendants.

13. This Court has personal jurisdiction over Defendants because they have continuous and systematic contacts with the State of California as to essentially render them “at home” in this State. Moreover, each of the Defendants have purposefully availed themselves of the laws and benefits of doing business in this State, and Plaintiff’s claims arise out of each of the Defendants’ forum-related activities. Furthermore, a substantial portion of the events giving rise to Plaintiff’s claims occurred in this District.

14. Pursuant to 28 U.S.C. § 1391, this Court is the proper venue for this action because a substantial part of the events, omissions, and acts giving rise to the claims herein occurred in this District. Moreover, Plaintiff resides in this District.

FACTS COMMON TO ALL CLAIMS

Overview Of NaviStone's Wiretaps

15. Defendant NaviStone is a marketing company and data broker that deals in U.S. consumer data. NaviStone's business model involves entering into voluntary partnerships with various e-commerce websites. Upon partnering with NaviStone, these e-commerce websites will

3 Id.

1 agree to insert a small parcel of computer code into their websites, which is provided by NaviStone
 2 (and is written by NaviStone). This small parcel of computer code serves as a so-called “back
 3 door” in computer terminology – its function is to retrieve and execute a much larger portion of
 4 JavaScript code that is remotely hosted on NaviStone’s servers. As NaviStone explains on
 5 navistone.com, “[a]dding a simple line of code to each page of your website enables a wealth of
 6 new marketing data.”

7 16. This “back door” code permits NaviStone to execute its own computer code on the
 8 websites of its e-commerce partners. Stated otherwise, the “simple line of code” that NaviStone
 9 requests its partners add “to each page of [their] website[s]” serves to call and execute remote
 10 computer code that is: (i) provided by NaviStone, (ii) written by NaviStone, and (iii) hosted on a
 11 remote server by NaviStone.

12 17. As currently deployed, NaviStone’s remote code functions as a wiretap. That is,
 13 when connecting to a website that runs this remote code from NaviStone, a visitor’s IP address and
 14 other PII is sent to NaviStone in real-time. NaviStone’s code also scans the visitor’s computer for
 15 data files that could reveal the visitor’s identity. NaviStone’s code will also spy on the visitor as he
 16 or she browses the website, capturing and redirecting the visitor’s keystrokes, mouse clicks and
 17 other electronic communications to NaviStone. This real-time interception and transmission of
 18 visitors’ electronic communications begins as soon as the visitor loads Moosejaw.com into their
 19 web browser. The intercepted communications include, among other things, information typed on
 20 forms located on Moosejaw.com, regardless of whether the user completes the form or clicks
 21 “Submit.” NaviStone then uses this information to attempt to de-anonymize website visitors.

22 18. NaviStone coordinates with additional entities who maintain back-end databases
 23 containing data and profiles on consumers across the U.S., which includes consumers’ names and
 24 mailing addresses. As users browse the various e-commerce websites that deploy NaviStone code,
 25 NaviStone attempts to “match” elements of the intercepted data with records of real-life people
 26 maintained in the back-end databases. Once a match is found, NaviStone de-anonymizes the user
 27 and updates the back-end databases with the user’s current browsing activities and PII.

28 19. NaviStone has partnered with hundreds e-commerce websites since beginning its

1 operations. By combining and correlating its data, NaviStone can watch consumers as they browse
 2 hundreds of participating e-commerce sites, in real-time.

3 20. Pursuant to an agreement with NaviStone, Moosejaw intentionally embedded
 4 NaviStone's software coded wiretaps on Moosejaw.com in order to scan visitors' computers for
 5 files that could be used to identify them, and also to intercept visitors' communications to obtain de-
 6 anonymized PII of visitors to Moosejaw's website.

7 21. NaviStone obfuscates the wiretap codes through dummy domains to attempt to
 8 conceal its activities. For example, part of NaviStone's remote code running on the Moosejaw
 9 website was located at <http://code.murdoog.com/onetag/C1DFC24D045BDD.js>.

10 22. On June 20, 2017, a leading tech news website, gizmodo.com, published an exposé
 11 on NaviStone's wiretaps entitled "Before You Hit 'Submit,' This Company Has Already Logged
 12 Your Personal Data."⁴ The Gizmodo article describes NaviStone as "a company that advertises its
 13 ability to unmask anonymous website visitors and figure out their home addresses."⁵ The article
 14 revealed that NaviStone is "in the business of identifying 'ready to engage' customers and matching
 15 'previously anonymous website visitors to postal names and addresses.' [NaviStone] says it can
 16 send postcards to the homes of anonymous website shoppers within a day or two of their visit, and
 17 that it's capable of matching '60-70% of your anonymous site traffic to Postal names and
 18 addresses.'"⁶

19 23. Indeed, on its own website, NaviStone boasts that it "invented progressive website
 20 visitor tracking technology," which allows it to "reach [] previously unidentifiable website
 21 visitors."⁷ According to NaviStone, "[b]y simply adding one line of code to each website page, you
 22 can unlock a new universe of 'ready to engage' customers."⁸

23 24. NaviStone also explains how to implement this software wiretaps on its clients'

24 25 ⁴ <https://gizmodo.com/before-you-hit-submit-this-company-has-already-logge-1795906081>
 26 27 ⁵ *Id.*
 28 28 ⁶ *Id.*

27 28 ⁷ <https://www.navistone.com/>

28 ⁸ *Id.*

1 webpages:

- 2 1: Insert One Line Of Code On Each Webpage.
3 We'll provide you and your IT team with a short tracking code
4 (and instructions) to insert on *each page* of your website.
5 Data collection begins immediately and is reviewed for quality
6 by our staff.
- 6 2: Identify Engaged Website Visitors.
7 Data is stored in a secure environment specifically dedicated
8 to your company's information. Website visitors are
9 identified as direct marketing prospects or reactivation targets
10 based on their level of engagement on your site, as identified
11 by unique algorithms developed by our data scientists.
- 10 3: Identify Verified Names and Addresses.
11 When unidentified website visitors show an intent to purchase
12 based on the modeling process described above, NaviStone®
13 will secure postal names and addresses to include in your
14 direct marketing prospecting and reactivation programs. ...
- 14 4: Use, Expand, Repeat.
15 NaviStone® will continue to track website behavior to identify
16 new, unique prospects and reactivation targets so you can
17 expand and optimize this unique process for success time and
18 time again.⁹

17 25. NaviStone's wiretaps intercept communications in real time. As *Gizmodo* put it,
18 "before you hit 'submit,' this company has already logged your personal data."¹⁰ *Consumerist* also
19 shared the same concern: "these forms collect your data even if you don't hit 'submit.'"¹¹

20 26. NaviStone's wiretaps are engaged as soon as the visitor arrives at Moosejaw.com.
21 By merely loading the main page on Moosejaw.com, with no other action, the visitor is connected
22 to NaviStone's wiretaps, which scan visitors' computers for identifying information, and also
23 intercept and monitor their communications.

24 27. Since NaviStone's wiretaps engage as soon as the visitor arrives at the main page of
25 Moosejaw.com, website visitors are not provided with an opportunity to review any privacy

26 ⁹ <https://www.navistone.com/how-it-works>

27 ¹⁰ <https://gizmodo.com/before-you-hit-submit-this-company-has-already-logge-1795906081>

28 ¹¹ <https://consumerist.com/2017/06/29/these-forms-collect-your-data-even-if-you-dont-hit-submit/>

1 policies or disclosures prior to deployment of the wiretaps. By the time a user reaches the privacy
 2 policy, the wiretaps have already been deployed, and the de-anonymization has already occurred.

3 28. As the visitor interacts with Moosejaw.com, for example, by adding an item to a
 4 shopping cart, typing information onto a form, viewing an item, etc., all of these communications
 5 are captured and redirected to NaviStone in real time, through the wiretaps. Indeed, as will be
 6 demonstrated below, when NaviStone's code is deployed on a webpage that contains an online
 7 form – such as a “sign up” page or an “account registration” page – the data is captured and
 8 redirected to NaviStone as it is typed. Visitors do not need click “Submit” on the form, or take any
 9 other action, for their communications to be intercepted and disclosed to NaviStone.

10 29. NaviStone's wiretaps are deployed on hundreds of e-commerce websites. Upon
 11 information and belief, NaviStone maintains and correlates its back-end database of User Data and
 12 PII across these hundreds of websites. For example, assume that Site X and Site Y are both running
 13 NaviStone's wiretaps. Now, assume that a user provides her name and phone number to Site X, but
 14 *not* to Site Y. Through the use of NaviStone's wiretaps and back-end database, NaviStone can de-
 15 anonymize the user on Site Y and know her name and phone number, even though she never
 16 provided that information to Site Y.

17 **NaviStone's Wiretaps In Action On Moosejaw.com**

18 30. Some aspects of the operation of NaviStone's wiretaps on the Moosejaw.com
 19 website can be observed using the Developer Tools Window in the Google Chrome browser. In the
 20 images below, the Moosejaw.com website, as it appears normally through the browser is shown in
 21 the left-hand side of the window, while the Developer Tools Network View, showing incoming and
 22 outgoing transmissions, is shown in the right-hand window.

23

24

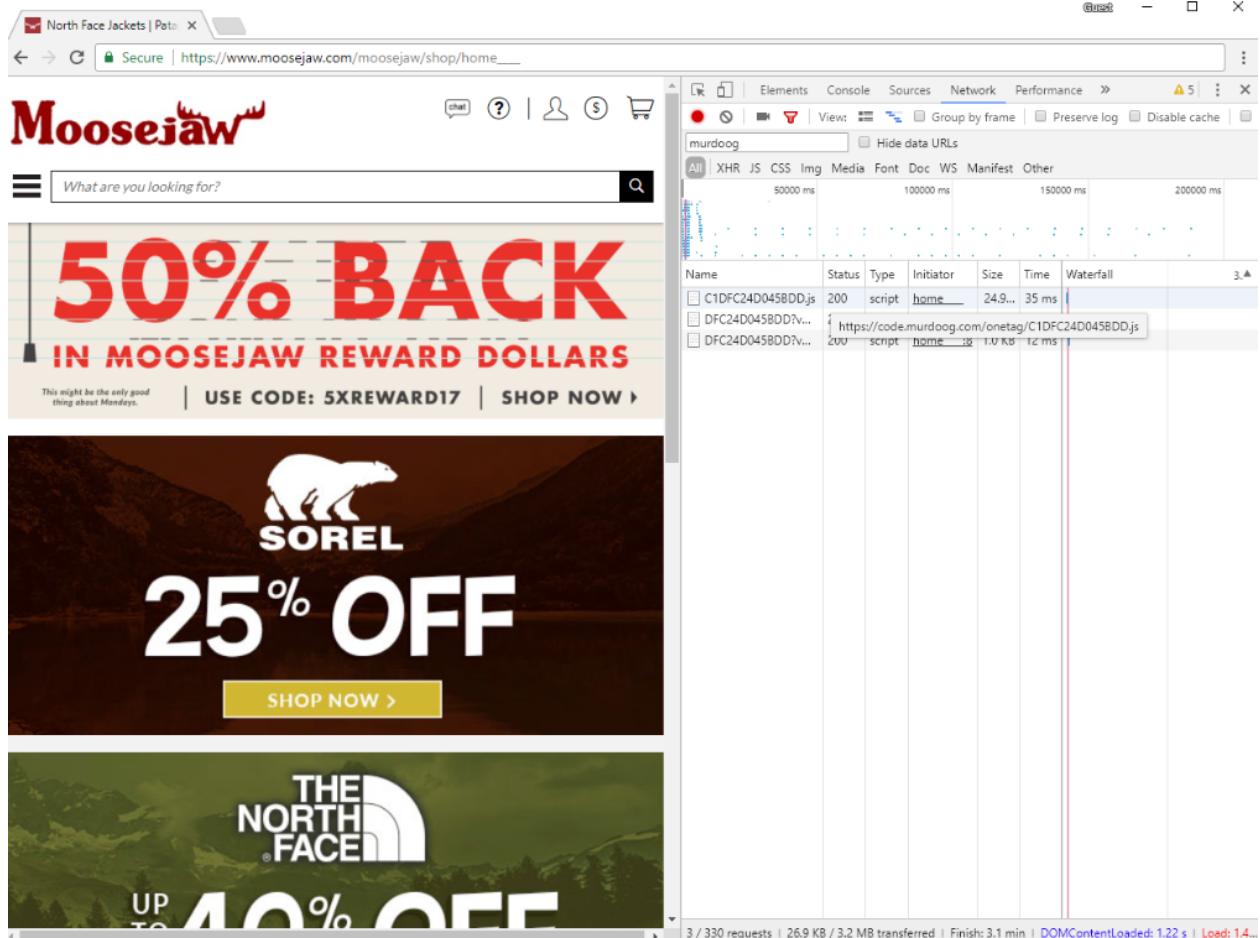
25

26

27

28

1 31. When Moosejaw.com is loaded into a browser, the website automatically retrieves a
 2 computer file located on a remote server. One such example is the computer file named
 3 “C1DFC24D045BDD.js,” which was hosted at <http://code.murdoog.com/onetag/>



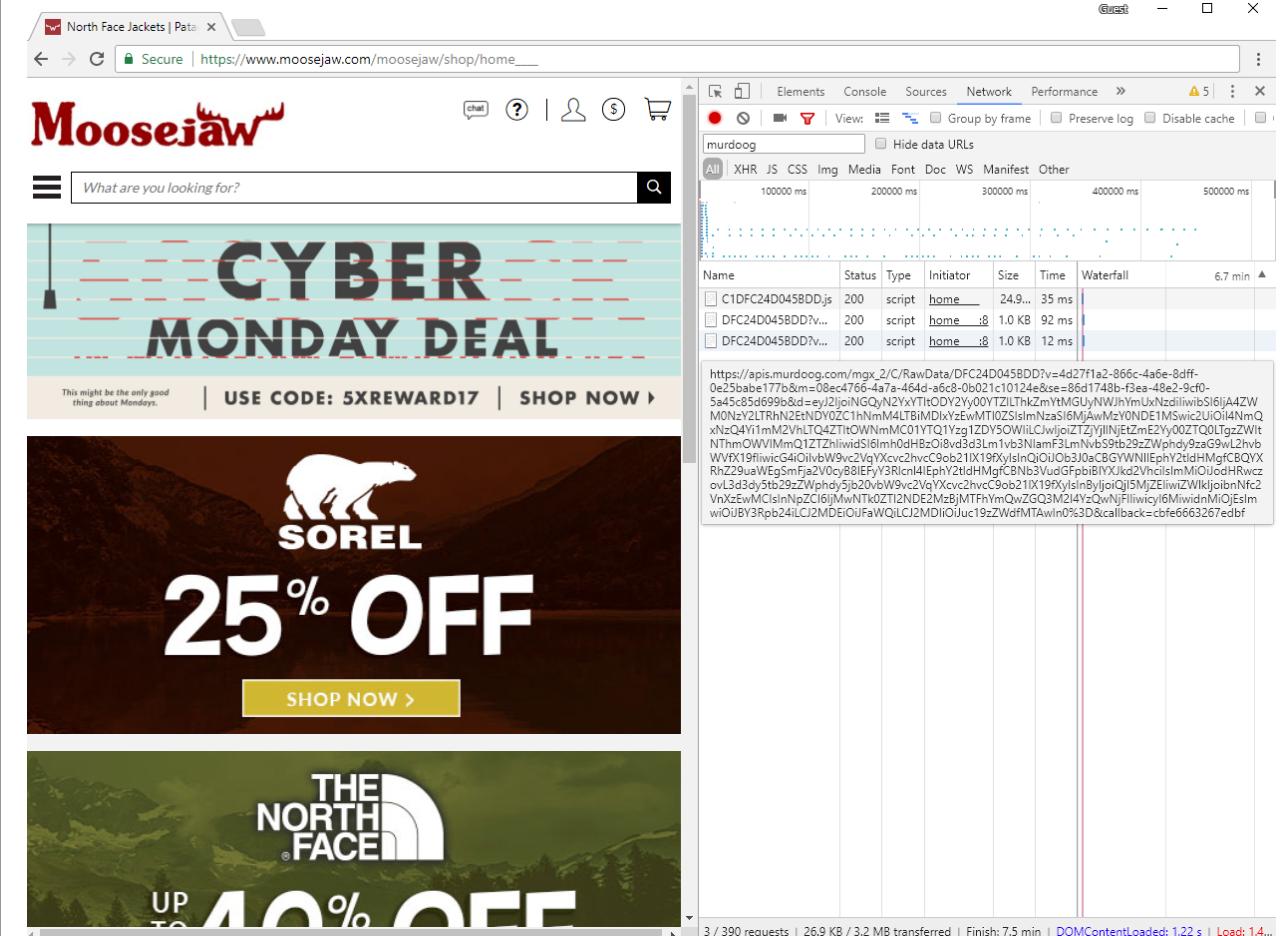
1 32. The file “C1DFC24D045BDD.js” is 24.9 KB in size and contains computer code
2 written in a language called JavaScript. It appears as such:

```
3 North Face Jackets | Path: https://code.murdoog.com/x
4 Secure | https://code.murdoog.com/onetag/C1DFC24D045BD.js
5
6
7
8
9
10
11
12
13
14
15
```

16 The top line of the code contains a comment indicating that it is to be used on “Moosejaw.com.”
17 However, the remainder of the code lacks comments, explanations, proper indenting, or intelligible
18 names for variables. Essentially, this code is obfuscated.

19 33. The domain “code.murdoog.com,” which deploys this code, is owned and operated
20 by NaviStone.

1 34. Next, the code in C1DFC24D045BDD.js is executed, with no further actions by the
 2 user, or prompting by Moosejaw or NaviStone. This immediately begins intercepting the visitors'
 3 electronic communications and transmitting them to https://apis.murdoog.com/



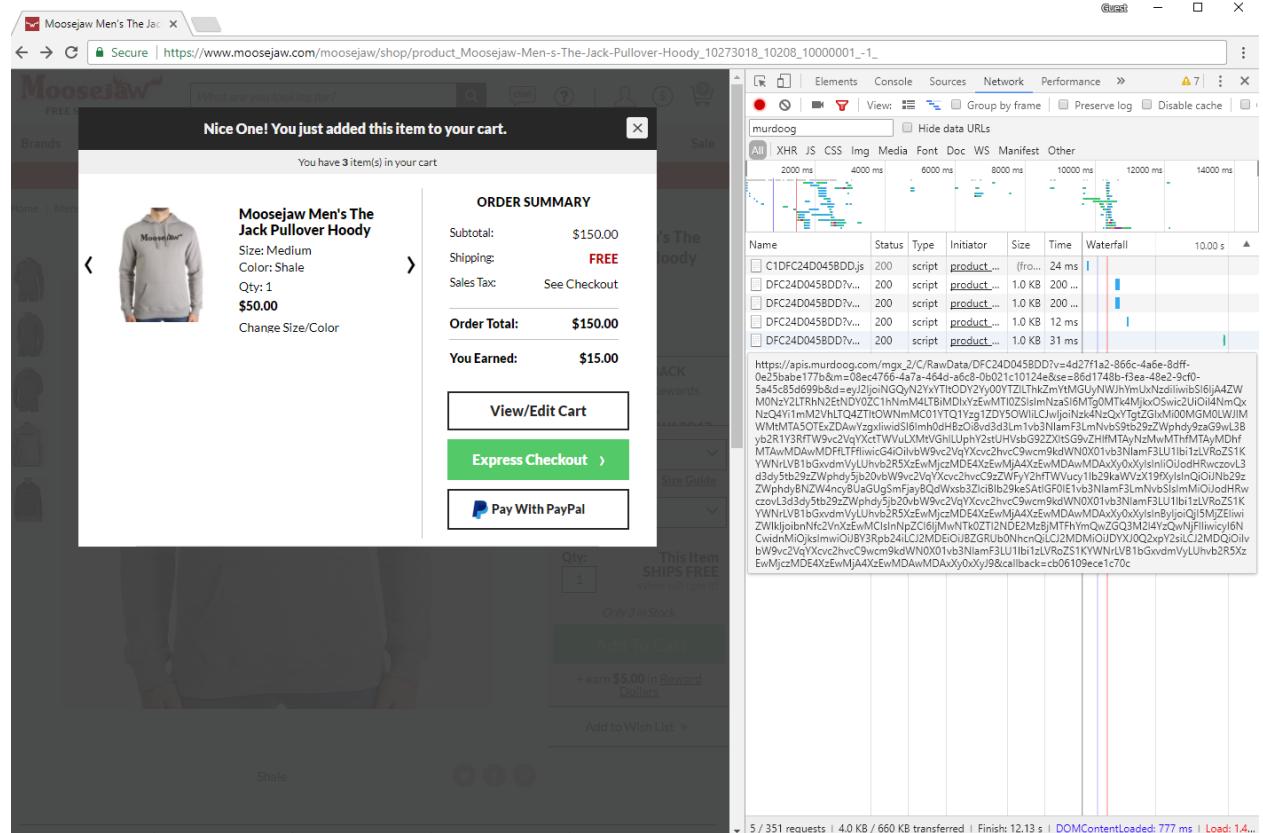
19 35. The domain "apis.murdoog.com" is also owned and operated by NaviStone.
 20 36. The intercepted communications are encoded in a format called Base64. When
 decoded, they appear as such:

```

{"v":"4d27f1a2-866c-4a6e-8dff-0e25babe177b","m":"08ec4766-4a7a-464d-a6c8-0b021c10124e","csi":2003644151,"se":"86d1748b-f3ea-48e2-9cf0-5a45c85d699b","p":"e6cb9e61-fa6c-4e44-83eb-58f9ee2d5e6a","u":"https://www.moosejaw.com/moosejaw/shop/home____","pn":"/moosejaw/shop/home____","t":"North Face Jackets | Patagonia Jackets | Arcteryx Jackets | Mountain Hardwear","c":"https://www.moosejaw.com/moosejaw/shop/home____","pr":"B2926D","eid":"ns_seg_100","sid":30594e2641630c11abd0dd73b8c4061e,"s":2,"vs":1,"l":"Action","v01":"Eid","v02":"ns_seg_100"}
  
```

1 Based on information and belief, other portions of these intercepted data (which are obfuscated
 2 such that they are machine-readable but are not readable by humans) include a timestamp, an ID
 3 number, the user's IP address, and other PII.

4 37. NaviStone's wiretap also monitors the user as he or she browses Moosejaw.com.
 5 The wiretaps will report every page visited by the user and any items the user added to his or her
 6 online shopping cart. Assume that a visitor is interested in a "Moosejaw Men's The Jack Pullover
 7 Hoodie," and adds it to his or her shopping cart:



The screenshot shows a web browser window for Moosejaw Men's The Jack Pullover Hoody. The page displays the product details: Size: Medium, Color: Shale, Qty: 1, \$50.00. It also shows the Order Summary: Subtotal: \$150.00, Shipping: FREE, Sales Tax: See Checkout, Order Total: \$150.00, You Earned: \$15.00. Buttons for View/Edit Cart, Express Checkout, and Pay With PayPal are visible. The Network tab in the developer tools shows several requests, including a main page load and various script and image requests. A long URL for a script request is visible in the Network tab.

21 This activity is immediately communicated to NaviStone as such:

```
22 {"v":"4d27f1a2-866c-4a6e-8dff-0e25babe177b","m":"08ec4766-  

23 4a7a-464d-a6c8-0b021c10124e","csi":1841982919,"se":"86d1748b-  

24 f3ea-48e2-9cf0-5a45c85d699b","p":"74ff4509-26a4-4c4c-88ce-  

25 68a9e3793d7a","u":"https://www.moosejaw.com/moosejaw/shop/pro-  

26 duct_Moosejaw-Men-s-The-Jack-Pullover-  

27 Hoody_10273018_10208_10000001_-  

28 1_","pn":"/moosejaw/shop/product_Moosejaw-Men-s-The-Jack-  

29 Pullover-Hoody_10273018_10208_10000001_-  

30 1_","r":"https://www.moosejaw.com/moosejaw/shop/search_Mens-  

31 Hoodies _","t":"Moosejaw Men's The Jack Pullover Hoody - at  

32 Moosejaw.com","c":"https://www.moosejaw.com/moosejaw/shop/pro-
```

duct_Moosejaw-Men-s-The-Jack-Pullover-Hoody_10273018_10208_10000001_-1_","pr":"B2926D","eid":"ns_seg_100","sid":"30594e2641630c11abd0dd73b8c4061e","s":3,"vs":7,"l":"Action","v01":"AddToCart","v03":"CartClick","v04":"/moosejaw/shop/product_Moosejaw-Men-s-The-Jack-Pullover-Hoody_10273018_10208_10000001_-1_"}qem\$q

38. When filling out forms, any PII the user provides is immediately, automatically, and secretly transmitted to NaviStone in real-time. Here, the user has just arrived on the “Checkout” page, and has not entered any information yet:

Moosejaw - Shipping and Secure | <https://www.moosejaw.com/moosejaw/shop/OrderShippingBillingView?storeId=10208&catalogId=10000001&langId=-1&krypto=0Rk5pTd4K1rSQISdrdjoScV1PvgelH2f3rbqkGRPZVnY3...>

Moosejaw

RETURN ANY TIME
as long as you're alive

SECURITY & PRIVACY
are guaranteed

Sign In Existing customers sign in for easier checkout.

1. CONTACT INFO

Email For order confirmation and tracking info

2. ADDRESS INFO

SHIPPING ADDRESS

First Name Last Name
Phone Number United States
Company Name (optional) Street address
Street address line 2 (optional) ZIP code Enter and we'll look-up your city and state.
City Choose a State
 This is also my billing address

BILLING ADDRESS

First Name Last Name
Phone Number United States

murdoch

All XHR JS CSS Img Media Font Doc WS Manifest Other

2000 ms 4000 ms 6000 ms 8000 ms 10000 ms 12000

Name	Status	Type	Initiator	Size	Time	Waterfall
C1DFC24D045BDD.js	200	script	OrderShi...	(from)	23 ms	
DFC24D045BDD.js	200	script	C1DFC24...	1.0 KB	15 ms	
DFC24D045BDD.js	200	script	C1DFC24...	1.0 KB	13 ms	

Place Secure Order

ABOUT SSL CERTIFICATES

3 / 250 requests | 2.0 KB / 605 KB transferred | Finish: 7.16 s | DOMContentLoaded: 2.15 s | Load: 3.03 s

39. Now, the user has entered his name “John.” A transmission is automatically, immediately, and secretly made to NaviStone:

1 40. Now, the user has entered his address at “123 State Street.” Again, another
 2 transmission is automatically, immediately, and secretly made to NaviStone:

16 41. By intercepting these communications, NaviStone is able to learn the identity of the
 17 visitor. As NaviStone boasts, it is capable of matching “60-70% of your anonymous site traffic to
 18 Postal names and addresses.”¹²

19 **Defendants’ Practice Of Scanning Visitors’ Computers For De-Anonymizing Files**

20 42. In conjunction with – and in addition to – the activities described above, Defendants’
 21 wiretaps also scan visitors’ computers for files that can be used to de-anonymize and identify the
 22 visitor.

23 43. To accomplish this task, Defendants coordinate with additional third-party data
 24 brokers, such as Aggregate Knowledge. Aggregate Knowledge maintains a back-end database
 25 containing consumers’ real names, addresses, contact information, browsing habits, and other PII.

26 44. When visiting certain websites partnered with Aggregate Knowledge, such as

27
 28 ¹² *Id.*

1 Kelty.com, a cookie will be placed on the visitor's computer from "AGKN.com." This is not an
 2 ordinary cookie, and has features that consumers would not expect from ordinary cookies. Rather,
 3 the AGKN.com cookie from Aggregate Knowledge contains an identification number for the
 4 visitor, which is linked to an entry in Aggregate Knowledge's back-end database. As the visitor
 5 enters his or her personal information on websites like Kelty.com (*e.g.*, by submitting one's
 6 shipping and billing information), the database is updated with the visitor's real name, address, and
 7 contact information. Entities like Aggregate Knowledge have deployed these cookies on a handful
 8 of participating retail and e-consumer websites.

9 45. In turn, when the user visits Moosejaw.com, Defendants' wiretaps will then scan the
 10 users' computer for cookies, such as AGKN.com, that can be used in conjunction with these third-
 11 party data brokers to de-anonymize and identify the visitor. If such a cookie is found, Defendants'
 12 wiretaps will transmit the cookie and identification number to the data broker (*e.g.*, Aggregate
 13 Knowledge), who will then notify Defendants of the visitor's real name, address, contact
 14 information, and browsing habits.

15 46. In contrast to the AKGN.com cookie, run-of-the-mill cookies that consumers might
 16 be familiar with do not de-anonymize consumers and play no role in monitoring keystrokes and
 17 mouse clicks.

18 **Other Allegations Common To All Claims**

19 47. Defendants, as corporations, are "persons."

20 48. Plaintiff's and Class Members' keystrokes, mouse clicks, and other interactions with
 21 Moosejaw.com are "electronic communications."

22 49. For at least some of the communications at issue, neither Moosejaw nor NaviStone
 23 was an intended recipient of the communication. For example, Mr. Revitch has never made any
 24 purchase from Moosejaw. Thus, any datafiles retrieved from his device, or any information he may
 25 have typed onto forms without clicking submit, or any keystrokes, mouse clicks, or similar touch
 26 gestures intercepted through the wiretaps, were communications with Mr. Revitch's Internet service
 27 provider for the purpose of accessing web content, and were not communications with Moosejaw or
 28 NaviStone. They were not communications to which Moosejaw or NaviStone were intended to be

1 parties.

2 50. At the time Defendants implemented the wiretaps on Moosejaw.com, they intended
 3 to commit tortious acts including disclosures of the intercepted information which violated the
 4 California Invasion of Privacy Act, Cal. Penal Code §§ 631, 632, and 635; violated the privacy
 5 rights under the California Constitution; and violated California's Consumers Legal Remedies Act,
 6 Civil Code §§ 1750, *et seq.*

7 51. Defendants' actions complained of herein, including secretly and instantaneously
 8 capturing and redirecting the keystrokes, mouse clicks, and other electronic communications of
 9 website visitors, are not necessary practices for owners, operators, and developers of Internet
 10 websites, nor are they incidental to the act of facilitating a website or e-commerce transactions.
 11 None of these actions was undertaken in the ordinary course of business. On the contrary, these
 12 actions are contrary to the legitimate expectations of website visitors, and are contrary to established
 13 industry norms. So much so that they were the subject of multiple exposés in industry publications,
 14 as discussed above.

15 52. Defendants' actions are and have been intentional as evidenced by, *inter alia*, their
 16 design and implementation of the software wiretaps on Moosejaw.com, their use of wiretaps to
 17 access files on visitors' computers that are unrelated to the Moosejaw.com website, and their
 18 disclosures and uses of the intercepted data files and communications for profit.

19 53. Defendants' actions are not part of routine Internet functionality. Wiretaps are not
 20 necessary or needed to operate an e-commerce website. The NaviStone code is novel.

21 54. Visitors have a reasonable expectation of privacy when browsing Moosejaw.com, in
 22 that they never expect that their keystrokes, mouse clicks, and other electronic communications
 23 were being intercepted and disclosed to a third party, or that Defendants would de-anonymize and
 24 identify them as a result of their browsing.

25 55. Defendants maintain records of the visitors they have wiretapped and de-
 26 anonymized, either through their own computer systems or through third-party contractors.

27 //

28 //

CLASS ACTION ALLEGATIONS

56. Plaintiff seeks to represent a class all persons in the State of California whose electronic or stored communications were intercepted through the use of NaviStone's wiretaps on Moosejaw.com (the "Class").

57. Members of the Class are so numerous that their individual joinder herein is impracticable. On information and belief, members of the Class number in the millions. The precise number of Class members and their identities are unknown to Plaintiff at this time but may be determined through discovery. Class members may be notified of the pendency of this action by mail and/or publication through the distribution records of Defendants.

58. Common questions of law and fact exist as to all Class members and predominate over questions affecting only individual Class members. Common legal and factual questions include, but are not limited to, whether Defendants have violated the California Invasion of Privacy Act (“CIPA”), Cal. Penal Code §§ 631, 632, and 635; have invaded Plaintiff’s privacy rights in violation of the California Constitution; have intruded upon the seclusion of Plaintiff; have violated California’s Consumers Legal Remedies Act, Civil Code §§ 1750, *et seq.*; and have committed other tortious acts as described herein.

59. The claims of the named Plaintiff are typical of the claims of the Class because the named Plaintiff, like all other class members, visited Moosejaw.com and had his electronic communications intercepted and disclosed to NaviStone through the use of NaviStone's wiretaps.

60. Plaintiff is an adequate representative of the Class because his interests do not conflict with the interests of the Class members he seeks to represent, he has retained competent counsel experienced in prosecuting class actions, and he intends to prosecute this action vigorously. The interests of Class members will be fairly and adequately protected by Plaintiff and his counsel.

61. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Class members. Each individual Class member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendants' liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex

1 legal and factual issues of this case. Individualized litigation also presents a potential for
2 inconsistent or contradictory judgments. In contrast, the class action device presents far fewer
3 management difficulties and provides the benefits of single adjudication, economy of scale, and
4 comprehensive supervision by a single court on the issue of Defendants' liability. Class treatment
5 of the liability issues will ensure that all claims and claimants are before this Court for consistent
6 adjudication of the liability issues.

7 62. Plaintiff brings all claims in this action individually and on behalf of members of the
8 Class against Defendants.

COUNT I

Violation Of The California Invasion Of Privacy Act,

Cal. Penal Code § 631

11 63. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set
12 forth herein.

13 64. Plaintiff brings this claim individually and on behalf of the members of the proposed
14 Class against Defendants.

65. California Penal Code § 631(a) provides, in pertinent part:

Any person who ... willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within this state; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained, or who aids, agrees with, employs, or conspires with any person or persons to lawfully do, or permit, or cause to be done any of the acts or things mentioned above in this section, is punishable by a fine not exceeding two thousand five hundred dollars

24 66. At all relevant times, by implementing NaviStone's wiretaps on Moosejaw.com,
25 each Defendant intentionally accessed, intercepted, read, learned, and/or collected the electronic
26 communications of Plaintiff and Class Members, and procured the other Defendant to do so.

27 67. When visiting Moosejaw.com, Plaintiff and Class Members had an objectively
reasonable expectation of privacy. Plaintiff and Class Members did not reasonably expect that

- 1 Defendants would intentionally access, intercept, read, learn, and collect Plaintiff and Class
- 2 Members' electronic communications.

3 68. Plaintiff and Class Members did not consent to any of Defendants' actions in
4 implementing NaviStone's wiretaps on Moosejaw.com. Nor have Plaintiff or Class Members
5 consented to Defendants' intentional access, interception, reading, learning, and collection of
6 Plaintiff and Class Members' electronic communications.

7 69. Plaintiff and Class Members have suffered loss by reason of these violations,
8 including, but not limited to, violation of the right of privacy and loss of value in their PII.

9 70. Unless restrained and enjoined, Defendants will continue to commit such illegal acts.

10 71. Pursuant to Cal. Penal Code § 637.2, Plaintiff and Class Members have been injured
11 by the violations of Cal. Penal Code § 631, and each seek damages for the greater of \$5,000 or three
12 times the amount of actual damages, as well as injunctive relief.

COUNT II
Violation Of The California Invasion Of Privacy Act,
Cal. Penal Code § 632

15 72. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set
16 forth herein.

73. Plaintiff brings this claim individually and on behalf of the members of the proposed
Class against Defendants.

¹⁹ 74. California Penal Code § 632(a) provides, in pertinent part:

A person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars

75. Defendants are “persons” under the California Invasion of Privacy Act.

76. At all relevant times, by implementing NaviStone's wiretaps on Moosejaw.com,
each Defendant intentionally used an electronic amplifying or recording device to eavesdrop upon

1 and record the confidential communications of Plaintiff and Class Members, and procured the other
2 Defendant to do so.

3 77. When visiting Moosejaw.com, Plaintiff and Class Members had an objectively
4 reasonable expectation of privacy. Plaintiff and Class Members did not reasonably expect that
5 Defendants would intentionally use an electronic amplifying or recording device to eavesdrop upon
6 and record the confidential communications of Plaintiff and Class Members.

7 78. Plaintiff and Class Members did not consent to any of Defendants' actions in
8 implementing NaviStone's wiretaps on Moosejaw.com. Nor have Plaintiff or Class Members
9 consented to Defendants' intentional use of an electronic amplifying or recording device to
10 eavesdrop upon and record the confidential communications of Plaintiff and Class Members.

11 79. Plaintiff and Class Members have suffered loss by reason of these violations,
12 including, but not limited to, violation of the right of privacy and loss of value in their PII.

13 80. Unless restrained and enjoined, Defendants will continue to commit such illegal acts.

14 81. Pursuant to Cal. Penal Code § 637.2, Plaintiff and Class Members have been injured
15 by the violations of Cal. Penal Code § 632, and each seek damages for the greater of \$5,000 or three
16 times the amount of actual damages, as well as injunctive relief.

COUNT III
Violation Of The California Invasion Of Privacy Act,
Cal. Penal Code § 635

19 82. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set
20 forth herein.

21 83. Plaintiff brings this claim individually and on behalf of the members of the proposed
22 Class against Defendants.

23 84. California Penal Code § 635 provides, in pertinent part:

Every person who manufactures, assembles, sells, offers for sale, advertises for sale, possesses, transports, imports, or furnishes to another any device which is primarily or exclusively designed or intended for eavesdropping upon the communication of another, or any device which is primarily or exclusively designed or intended for the unauthorized interception or reception of communications between cellular radio telephones or between a cellular radio

telephone and a landline telephone in violation of Section 632.5, or communications between cordless telephones or between a cordless telephone and a landline telephone in violation of Section 632.6, shall be punished by a fine not exceeding two thousand five hundred dollars

85. At all relevant times, by implementing NaviStone's wiretaps on Moosejaw.com, each Defendant intentionally manufactured, assembled, sold, offered for sale, advertised for sale, possessed, transported, imported, and/or furnished a wiretap device that is primarily or exclusively designed or intended for eavesdropping upon the communication of another, and procured the other Defendant to do so.

86. NaviStone's code is a "device" that is "primarily or exclusively designed" for eavesdropping. That is, the NaviStone code is designed to gather PII, including keystrokes, mouse clicks, and other electronic communications. The NaviStone code is also designed to scan visitors' computers in search of files that could be used to de-anonymize them.

87. When visiting Moosejaw.com, Plaintiff and Class Members had an objectively reasonable expectation of privacy.

88. Plaintiff and Class Members did not consent to any of Defendants' actions in implementing NaviStone's wiretaps on Moosejaw.com.

89. Plaintiff and Class Members have suffered loss by reason of these violations, including, but not limited to, violation of the right of privacy and loss of value in their PII.

20 90. Unless restrained and enjoined, Defendants will continue to commit such illegal acts.

91. Pursuant to Cal. Penal Code § 637.2, Plaintiff and Class Members have been injured by the violations of Cal. Penal Code § 635, and each seek damages for the greater of \$5,000 or three times the amount of actual damages, as well as injunctive relief.

COUNT IV
Invasion Of Privacy Under California's Constitution

92. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set forth herein.

1 93. Plaintiff brings this claim individually and on behalf of the members of the proposed
2 Class against Defendants.

3 94. Plaintiff and Class Members have an interest in: (1) precluding the dissemination
4 and/or misuse of their sensitive, confidential PII; and (2) making personal decisions and/or
5 conducting personal activities without observation, intrusion or interference, including, but not
6 limited to, the right to visit and interact with various Internet sites without being subjected to
7 wiretaps without Plaintiff's and Class Members' knowledge or consent.

8 95. At all relevant times, by implementing NaviStone's wiretaps on Moosejaw.com,
9 each Defendant intentionally invaded Plaintiff and Class Members' privacy rights under the
10 California Constitution, and procured the other Defendant to do so.

11 96. Plaintiff and Class Members had a reasonable expectation that their PII and other
12 data would remain confidential and that Defendants would not install wiretaps on Moosejaw.com.

13 97. Plaintiff and Class Members did not consent to any of Defendants' actions in
14 implementing NaviStone's wiretaps on Moosejaw.com.

98. This invasion of privacy is sufficiently serious in nature, scope and impact.

16 99. This invasion of privacy constitutes an egregious breach of the social norms
17 underlying the privacy right.

COUNT V
Invasion Upon Seclusion

20 100. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set
21 forth herein.

22 101. Plaintiff brings this claim individually and on behalf of the members of the proposed
22 Class against Defendants.

24 102. At all relevant times, by implementing NaviStone's wiretaps on Moosejaw.com,
25 each Defendant intentionally intruded upon the seclusion of Plaintiff and Class Members, and
26 procured the other Defendant to do so.

²⁷ ¶ 103. Defendants' deception was deliberate.

1 104. When visiting Moosejaw.com, Plaintiff and Class Members had an objectively
2 reasonable expectation of privacy.

3 105. Plaintiff and Class Members did not consent to any of Defendants' actions in
4 implementing NaviStone's wiretaps on Moosejaw.com.

5 106. Defendants' intentional intrusion on Plaintiff's and Class Members' solitude or
6 seclusion without consent would be highly offensive to a reasonable person.

COUNT VI
Violation Of California's Consumers Legal Remedies Act,
Civil Code §§ 1750, et. seq.

9 107. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set
10 forth herein.

11 108. Plaintiff brings this claim individually and on behalf of the members of the proposed
12 Class against Defendants.

13 109. CLRA § 1770(a)(5) prohibits “[r]epresenting that goods or services have
14 sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not
15 have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she
16 does not have.” Defendants violated this provision by representing that their website and online
17 services have characteristics, uses, and benefits which they do not have.

110. Given that Defendant Moosejaw is a retailer of clothing and outerwear, visitors to
Moosejaw.com plainly intend to browse the site to review Moosejaw's clothing and outerwear
offerings.

111. During each of these visits, Mr. Revitch browsed Moosejaw.com because he
intended to purchase outerwear.

23 112. At the time Defendants made their misrepresentations and omissions, they were
24 aware that they had installed a wiretap on Moosejaw.com.

113. Plaintiff and Class members suffered injuries caused by Defendants' misrepresentations and omissions because: (a) Plaintiff suffered an invasion of his privacy as a

1 result of Defendants' wiretap on Moosejaw.com, and (b) Plaintiff was deprived of any income that
2 Defendants generated through their unauthorized use or sale of Plaintiff's data.

3 114. Prior to the filing of this Complaint, a pre-suit notice letter was served on Defendants
4 that complied in all respects with California Civil Code § 1782(a). On November 9, 2018, Plaintiff
5 Revitch, by and through his counsel, sent Defendants letters via certified mail, return receipt
6 requested, advising Defendants they were in violation of the CLRA and must correct, repair,
7 replace, or otherwise rectify the goods alleged to be in violation of § 1770.

8 115. Pursuant to California Civil Code § 1780(d), attached is an affidavit showing this is
9 the proper forum.

10 116. Wherefore, Plaintiff seeks compensatory damages, punitive damages, and restitution
11 of any ill-gotten gains due to Defendants' acts and practices, as well as injunctive relief for this
12 violation of the CLRA in the form of a Court order requiring Defendants to immediately cease their
13 wiretap activity and purge their extant data acquired through the wiretaps on Moosejaw.com.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seeks judgment against Defendants, as follows:

- a. For an order certifying the Class under Rule 23 and naming Plaintiff as the representative of the Class and Plaintiff's attorneys as Class Counsel to represent the Class;
 - b. For an order declaring that the Defendants' conduct violates the statutes referenced herein;
 - c. For an order finding in favor of Plaintiff and the Class on all counts asserted herein;
 - d. For compensatory, punitive, and statutory damages in amounts to be determined by the Court and/or jury;
 - e. For prejudgment interest on all amounts awarded;
 - f. For an order of restitution and all other forms of equitable monetary relief;
 - g. For injunctive relief as pleaded or as the Court may deem proper; and

h. For an order awarding Plaintiff and the Class their reasonable attorneys' fees and expenses and costs of suit.

DEMAND FOR TRIAL BY JURY

Plaintiff demands a trial by jury of all issues so triable.

Dated: May 22, 2019

Respectfully submitted,

BURSOR & FISHER, P.A.

By: /s/ L. Timothy Fisher
L. Timothy Fisher

L. Timothy Fisher (State Bar No. 191626)
Joel D. Smith (State Bar No. 244902)
Frederick J. Klorczyk III (State Bar. No. 320783)
1990 North California Boulevard, Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
E-Mail: ltfisher@bursor.com
jsmith@bursor.com
fklorczyk@bursor.com

BURSOR & FISHER, P.A.

Scott A. Bursor (State Bar No. 276006)
2665 S. Bayshore Dr., Suite 220
Miami, FL 33133-5402
Telephone: (305) 330-5512
Facsimile: (305) 676-9006
E-Mail: scott@bursor.com

Attorneys for Plaintiff